IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH NAGPUR

SA No. 509/2004

Office Notes, Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders. : Court's or Judge's orders

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CORAM : A.P. Lavande, J.
Dated : November 17, 2006

Heard Mrs. Jawalkar, learned counsel for the appellant.

By this appeal, the appellant takes exception to the judgment and decree dated 23.4.2002 passed by 7th Additional District Judge, Nagpur in Regular Civil Appeal No.339/1993 dismissing the appeal filed by the appellant-plaintiff against judgment and decree dated 10.3.1993 passed by 4th Joint Civil Judge, Senior Division, Nagpur in Regular Civil Suit No. 737/1986 dismissing the suit filed by the plaintiff for specific performance of the agreement against defendant no.1.

The above suit was filed by the plaintiff against defendants for specific

performance of agreement of sale dated 31.3.1983 entered between the plaintiff and defendant no.2 on one side and defendant no.1 on the other side. The last date of execution of sale deed was 28.2.1984. On 28.6.1983 defendant no.1 sold the suit plot to defendant no.2. After exchange of correspondence between the parties, the plaintiff filed suit for specific performance of the agreement of sale and in the alternative she claimed refund of earnest money of Rs. 750/- along with interest thereon. The suit was contested and the trial Court, after appreciating the evidence led by the parties, held against the plaintiff on several grounds. The trial Court further held that the plaintiff was not ready and willing to perform her part of the contract. This finding has been upheld by the lower appellate Court in appeal preferred by the plaintiff.

Mrs. Jawalkar, learned counsel for the appellant submitted that both the Courts below have erred in giving finding

that the plaintiff was not ready and willing to perform her part of the contract and the said finding is perverse. She further submitted that the plaintiff had led cogent evidence to prove that she was ready and willing to perform her part of the contract by producing affidavit and stamp papers purchased by her to prove that she was in Sub Registrar's office to execute the sale deed on 28.2.1984. Lastly, she submitted that the defendants did not enter into witness box, therefore, adverse inference ought to have been drawn against them and the decree of specific performance ought to have been passed by the Courts below in favour of the plaintiff.

Having considered the submissions made by learned counsel for the appellant and having perused records, I find myself unable to accept the submissions made by learned counsel for the appellant. The finding given by the trial Court and up-held by lower appellate Court that the plaintiff has not proved that she was ready and

willing to perform her part of the contract is a finding based upon proper appreciation of the evidence and as such cannot be said to be perverse. It is well settled that in a suit for specific performance of the contract, the plaintiff has to aver in the plaint that he/she was all the time ready and willing to perform his/her part of the contract and prove the same. It is also well settled that jurisdiction to grant specific performance is discretionary which has to be exercised on well settled principles. I do not find any infirmity in the findings given by both the Courts below. The finding given by both the Courts below cannot be said to be perverse warranting interference in second appeal.

Insofar as the argument of Mrs. Jawalkar that adverse inference against defendants has to be drawn for not stepping in the witness box is concerned, I do not find any merit having regard to the fact that unless the plaintiff proves her case, a suit for specific performance cannot be decreed although the defendants chose not

to step in the box. In the present case the plaintiff has not established that she was ready and willing to perform her part of the contract. Therefore, mere fact that the defendants did not step in the box does not advance the case of the plaintiff any further.

For the aforesaid reasons, I do not find any merit in this appeal. No substantial question of law is involved in the appeal. Hence, the appeal is summarily rejected.

C.A. No. 7240/2004

In view of dismissal of second appeal, nothing survives in the application. Hence, the civil application is dismissed as infructuous.

JUDGE

A.